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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. OLIVER SCHAPER, Defendant and Appellant.	D073262 (Super. Ct. No. SCE364279)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Reversed in part and remanded with instructions.

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Allison V. Acosta and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Oliver Schaper[1] guilty of five counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a))[2] and one count of contacting a minor with the intent to commit a sexual offense (§ 288.3, subd. (a).) As to three of the lewd act counts, the jury further found that Schaper had substantial sexual conduct with the victim. (§ 1203.066, subd. (a)(8).) The trial court sentenced Schaper to prison for a term of 16 years.

Schaper contends that (1) his right to due process was violated because the trial court instructed the jury with CALCRIM No. 1193 regarding the testimony presented by an expert on the typical behavior of child sexual abuse victims; (2) the trial court improperly imposed a restitution fine (§ 1202.4) and parole revocation restitution fine (§ 1202.45) of $17,600 each, even though the statutory maximum for each fine is $10,000; and (3) Schaper is entitled to an additional day of presentence custody credit. As the People concede, Schaper's last two points have merit. However, as to the first point, we conclude that Schaper's due process rights were not violated when the trial court instructed with CALCRIM No. 1193. According, we remand to the trial court with instructions that it correct the error in the restitution fine and the parole revocation restitution fine, and that it award another day of presentence custody credit. In all other respects we affirm the judgment.

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1 Although Schaper was charged in this case as Oliver Schaper, his legal name is apparently Hendrick Oliver Stone. For the sake of consistency, we refer to appellant as Schaper.

2 Unless otherwise indicated, all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Starting when Jane Doe was approximately nine years old, she began living in a household with Schaper, who was her mother's boyfriend. When she was 15 years old, and no longer living with Schaper, Jane Doe disclosed to her mother that Schaper had molested her. As Jane Doe later testified at trial, on at least four occasions when she was approximately nine years old, Schaper touched her in the breast and genital area over her clothes while purportedly tickling her. On at least two other occasions when she was also approximately nine years old, Schaper asked Jane Doe to come into bed with him to watch a movie, where he inserted his fingers into her vagina and put his tongue on her vagina. Jane Doe testified about other sexual contact that occurred after they moved to a house in a different state, which did not form the basis for any of the counts charged in this case. Specifically, Jane Doe testified that on two occasions when she was 12 or 13 years old, Schaper directed her to stroke his erect penis with her hand while she was giving him a massage. Another time, Schaper held her down on a bed, pulled up her shirt and touched her breast with his hand and mouth.

After law enforcement was informed about the molestation, a police officer obtained the permission of Jane Doe and her mother to set up a Facebook account in Jane Doe's name to communicate with Schaper. In online conversations through Facebook between Schaper and the police officer posing as Jane Doe, Schaper did not contest statements suggesting that he had molested Jane Doe. Schaper also made statements during the Facebook conversations which strongly suggested that he was currently

interested in meeting with Jane Doe and engaging in sexual activity. Jane Doe was a minor at the time of the Facebook conversations.

Schaper was charged with five counts of committing a lewd act upon a child (§ 288, subd. (a)) and one count of contacting a minor with the intent to commit a sexual offense (§ 288.3, subd. (a)). As to three of the lewd act counts, it was also alleged that Schaper had substantial sexual conduct with the victim. (§ 1203.066, subd. (a)(8).)

Schaper testified at trial. He denied molesting Jane Doe, and he explained the Facebook conversations by contending that he was not paying attention during them, that he meant certain comments in an innocent manner, or in other instances, that he mistakenly thought he was sending a message to someone else because he was maintaining several online conversations at the same time.

The jury found Schaper guilty on all counts. The trial court sentenced Schaper to prison for a term of 16 years.

II.

DISCUSSION

A. *The Trial Court Did Not Violate Schaper's Right to Due Process by Instructing with CALCRIM No. 1193 Regarding the Testimony of the Expert on Child Sexual Abuse Victims*

At trial, the People presented the testimony of social worker Deborah Davies as an expert regarding the typical behavior of child sexual abuse victims. Davies was not informed about any details of the instant case and did not meet with Jane Doe. The purpose of Davies's testimony was to dispel certain myths that jurors might hold about the behavior of child sexual abuse victims concerning delayed disclosure. Davies

testified about the research and literature concerning child sexual abuse victims. Among other things, she stated that the research shows that the majority of molested children will delay in making a disclosure, and she described certain factors that influence whether or not a child is likely to delay in disclosing. On cross-examination, defense counsel elicited testimony that some of the research and literature Davies relied upon related to Child Sexual Abuse Accommodation Syndrome (CSAAS). Davies agreed on cross-examination that CSAAS was not intended for determining whether sexual abuse actually occurred, and the fact that a child delayed in disclosing sexual abuse does not mean that any such abuse actually occurred.[3]

Based on CALCRIM No. 1193, the trial court instructed the jury regarding Davies's testimony:

> "You have heard testimony from Deborah Davies regarding child sexual abuse victims.
>
> "Deborah Davies's testimony about child sexual abuse victims is not evidence that the defendant committed any of the crimes charged against him.

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[3] During closing argument, defense counsel emphasized this aspect of Davies's testimony, stressing that Davies agreed that "just because a child makes allegations of abuse that happened long ago, it does not mean that the abuse actually happened." Defense counsel also argued, "[I]t's one thing to say that many abused children delay reporting. And another thing to say that all children who delay reporting actually were abused. That is not true. And Ms. Davies also agreed with my statement that the research she told you about does not provide you any guidance in determining whether the claim of abuse is truthful or not. That is not her goal. Her goal is [to] conduct good interviews and train people how to conduct good interviews. But her goal is not to determine whether the child is telling the truth. That job is left to you."

> "You may consider this evidence only in deciding whether or not [Jane Doe's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."[4]

Schaper argues that his right to due process was violated because the instruction failed to tell the jury that Davies's testimony "could not be used to determine if the molestation claim was true." Schaper also contends that the instruction should have stated that "CSAAS assumes abuse occurred and seeks to explain the victim's common reactions to that experience." Schaper contends that CALCRIM No. 1193 is an "incomplete instruction" because of the omissions, and that it therefore allowed the jury to conclude that molestation occurred without a finding of guilt beyond a reasonable doubt.

1. *The People's Contention That Schaper Forfeited His Appellate Challenge*

As an initial matter, we consider the People's contention that Schaper has forfeited his appellate challenge to CALCRIM No. 1193 because he did not object in the trial court.

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4 The instruction was a modification of CALCRIM No. 1193, which provides as follows:

> "You have heard testimony from _____ <*insert name of expert*> regarding child sexual abuse accommodation syndrome.
> "____'s <*insert name of expert*> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).
> "You may consider this evidence only in deciding whether or not ____'s <*insert name of alleged victim of abuse*> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony."

As the People accurately point out, Schaper did not raise any objection to CALCRIM No. 1193. During motions in limine, defense counsel argued that Davies's testimony should be excluded "because of the danger of that kind of testimony being used by the jury to conclude that, if [Jane Doe] did not report immediately, that must mean she was actually abused." The trial court ruled that Davies's testimony was relevant and would be admitted, and that it would instruct with CALCRIM No. 1193 to explain the limited purpose of the testimony. Defense counsel made no objection to the instruction at that time. Later when jury instructions were being discussed with the trial court, defense counsel did not object to CALCRIM No. 1193 or request the instruction be modified or clarified.[5]

Relying on the principle that a defendant forfeits an argument that a jury instruction should have been clarified if that argument is not raised in the trial court, the People contend that Schaper has forfeited his challenge to CALCRIM No. 1193. (See *People v. Lee* (2011) 51 Cal.4th 620, 638 ["failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal"].) According to Schaper because he contends that CALCRIM No. 1193 was legally incorrect and violated his right to due process, the appellate challenge is not forfeited. Schaper relies on the principle that "[w]here . . . defendant asserts that an instruction is incorrect in law an

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[5] During the discussion of jury instructions, the only reference to CALCRIM No. 1193 was the prosecutor's request to remove the reference to testimony about "child sexual abuse accommodation syndrome" in the form instruction and replace it with a reference to testimony about "child sexual abuse victims." Defense counsel stated that she agreed with the change.

objection is *not* required." (*People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11, italics added.) We agree with Schaper that insofar as he attempts to characterize his argument as a challenge to the validity of CALCRIM No. 1193, no objection to the instruction was required to preserve his appellate challenge.

Further, another exception to the forfeiture doctrine for failure to object to an instruction arises when a defendant's substantial rights are at issue. (§ 1259; *People v. Battle* (2011) 198 Cal.App.4th 50, 64.) "Substantial rights are affected if the error 'result[s] in a miscarriage of justice, [i.e.,] making it reasonably probable defendant would have obtained a more favorable result in the absence of error.' " (*People v. Elsey* (2000) 81 Cal.App.4th 948, 953, fn. 2.) "In this regard, '[t]he cases equate "substantial rights" with reversible error' under the test stated in *People v. Watson* (1956) 46 Cal.2d 818." (*People v. Felix* (2008) 160 Cal.App.4th 849, 857.) Thus, " ' "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." ' " (*People v. Franco* (2009) 180 Cal.App.4th 713, 719.) Accordingly, even were we to conclude that the failure to object to the instruction forfeited the appellate argument, we would still be required to consider the issue to determine whether any instructional error impacted Schaper's substantial rights.

We accordingly proceed to consider the merits of Schaper's argument that the trial court violated his due process rights by instructing with CALCRIM No. 1193.

2. *Standard of Review*

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) " 'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' . . . [¶] 'We credit jurors with intelligence and common sense . . . and do not assume that these virtues will abandon them when presented with a court's instructions. . . .' [¶] We ask whether a 'reasonable juror would apply the instruction in the manner suggested by defendant.' " (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1395-1396, citations omitted.)

3. *Instructing with CALCRIM No. 1193 Did Not Violate Schaper's Due Process Rights*

In evaluating Schaper's challenge to CALCRIM No. 1193, we begin with the principle, relied upon by Schaper, that testimony regarding delayed disclosure by child sexual abuse victims is generally admissible at trial, *but only for a limited purpose*. Specifically, as case law establishes, " '[e]xpert testimony on the common reactions of a child molestation victim is not admissible to prove the sex crime charged *actually occurred*. However, CSAAS testimony "is admissible to rehabilitate [the molestation victim's] credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." ' " (*People v. Perez* (2010) 182 Cal.App.4th 231, 245, italics added; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 (*McAlpin*) [discussing the

admissibility of CSAAS evidence "to rehabilitate such witness's credibility" but not "to prove that the complaining witness has in fact been sexually abused"].) In *People v. Bowker* (1988) 203 Cal.App.3d 385 (*Bowker*)—one of the first cases to consider the admissibility of expert evidence on CSAAS—the court set forth guidelines for crafting a jury instruction for such testimony. "[T]he jury must be instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true. The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that of a jury. CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience. . . . The evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*Id*. at p. 394, citation omitted.) "[W]hen testimony concerning CSAAS is admitted, the court must sua sponte instruct the jury that this evidence should not be used to determine if the victim's claims are true." (*People v. Housley* (1992) 6 Cal.App.4th 947, 956-957 (*Housley*).) Schaper contends that CALCRIM No. 1193 does not meet these requirements, and, moreover, that the instruction violates a defendant's right to due process because it improperly allows the jury to find a defendant committed the charged sexual abuse without finding him guilty beyond a reasonable doubt.

In his challenge to CALCRIM No. 1193, Schaper focuses on the last sentence of the instruction, which states the jury "may consider [Davies's testimony about child sexual abuse victims] only in deciding whether or not [Jane Doe's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the

believability of her testimony." According to Schaper, by informing the jury that it could use Davies's testimony "in evaluating the believability of [Jane Doe's] testimony," the jury was "permitted not only to find [Jane Doe] credible but also to find the allegations against [Schaper] true *without so finding beyond a reasonable doubt*." (Italics added.) Schaper contends that the instruction impermissibly communicated that the jury could find Schaper guilty without so finding beyond a reasonable doubt because "the instruction failed to say the CSAAS testimony could not be used to determine if the molestation claim was true."[6]

We are not persuaded. Despite Schaper's contention that CALCRIM No. 1193 failed to instruct the jury that Davies's testimony could not "be used to determine if the allegations are true," the instruction contained language that clearly communicated precisely that point. Specifically, the instruction told the jury that Davies's testimony was "not evidence that the defendant committed any of the crimes charged against him."

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6 Schaper also makes a brief argument that CALCRIM No. 1193 is flawed because it does not "explain that CSAAS assumes abuse occurred and seeks to explain the victim's common reactions to that experience, as required by *Bowker*." This contention has already been persuasively rejected by case law, which we rely upon here. In *People v. Gilbert* (1992) 5 Cal.App.4th 1372, the defendant argued that the limiting instruction on the use of CSAAS testimony was flawed because it "did not advise the jury that evidence of this kind '*assumes* that a molestation has in fact occurred and that the complaining witnesses[']reactions were common explanations of a factual event.' " (*Id.* at p. 1387.) *Gilbert* rejected the argument, explaining that it was "based on explanatory language, in *Bowker*, which in our view was patently intended to make the opinion clear to the attorney or judge who read it and not to be incorporated (at least in the unelaborated form [defendant] suggests) in an instruction to the jury. . . . We would consider it unnecessary, and potentially confusing and misleading, to add the language [defendant] proposes." (*Gilbert*, at p. 1387.)

Schaper acknowledges this language, but contends that it is not adequate because it does not "emphatically instruct the jury it cannot consider the evidence when determining guilt." Focusing on the statement in CALCRIM No. 1193 that permits the jury to use the Davies's testimony "to evaluat[e] the believability of [Jane Doe's] testimony," Schaper argues that there is "the potential for the jury to determine the complaining witness's testimony is believable and hence that the allegations of abuse *must have* occurred." (Italics added.) According to Schaper, "if the jury, applying the expert testimony to the percipient witness, finds the witness believable, the *unavoidable conclusion* is that the defendant is guilty." (Italics added.)

The argument fails. Contrary to Schaper's suggestion, the instruction does not allow the jury to conclude that Schaper molested Jane Doe based solely on Davies's testimony. Instead, the instruction simply allows the jury to use Davies's testimony as one factor in assessing Jane Doe's credibility. In arguing that CALCRIM No. 1193 improperly allows the jury to use Davies's testimony to determine that the molestation allegations are true, Schaper improperly conflates two distinct types of evidence: (1) evidence relevant to a victim's credibility; and (2) evidence that the defendant committed the offense. Case law discussing the admissibility of CSAAS evidence consistently recognizes that the two types of evidence are different. For example, *Housley* explains that although CSAAS evidence cannot be used to prove that molestation occurred, such evidence was "properly admitted" in that case "to rehabilitate [the victim's] credibility and to explain the pressures that sometimes cause molestation victims to falsely recant their claims of abuse." (*Housley, supra,* 6 Cal.App.4th at

p. 956). Similarly, *Bowker* explains that although CSAAS evidence may not be "used to determine whether the victim's molestation claim is true," it may be used "to rebut defense attacks on the [victim's] credibility." (*Bowker*, *supra*, 203 Cal.App.3d at p. 394.) Most significantly, our Supreme Court expressly stated that although CSAAS evidence is "not admissible to prove that the complaining witness has in fact been sexually abused," "it is admissible to rehabilitate such witness's credibility." (*McAlpin*, *supra*, 53 Cal.3d at p. 1300.) In light of these authorities—each of which recognizes that evidence of a witness's credibility is different from evidence that the molestation occurred—there is no merit to Schaper's contention that by stating that the jury could use Davies's testimony "in evaluating the believability of [Jane Doe's] testimony," CALCRIM No. 1193 impermissibly instructed the jury that it could use Davies's testimony to conclude that Schaper committed the molestation.

In sum, the jury was instructed that it could not use Davies's testimony as "evidence that the defendant committed any of the crimes charged against him," and it was informed it could use the testimony "only in deciding whether or not [Jane Doe's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." In separate instructions, it was also informed of the presumption of innocence and the People's burden to prove Schaper guilty beyond a reasonable doubt. Taken together, these instructions are clear and would be understood by a reasonable juror. The instructions did not create any risk that jurors would believe they could rely on Davies's testimony to convict Schaper even if guilt had not been proven beyond a reasonable doubt based on other evidence. (Accord *People v.*

Gonzales (2017) 16 Cal.App.5th 494, 503, 504 [rejecting appellant's argument that "it is impossible to use the CSAAS testimony to evaluate the believability of [the victim's] testimony without using it as proof that [appellant] committed the charged crimes," and holding that CALCRIM No. 1193 "was proper and did not violate due process"].)

B. *The Restitution Fine and the Parole Revocation Restitution Fine Improperly Exceeded the Limit of $10,000 Each*

At sentencing, the trial court imposed a restitution fine pursuant to section 1202.4, subdivision (b) in the amount of $17,600. It also imposed a corresponding parole revocation restitution fine of $17,600, which was suspended unless parole was revoked. (§ 1202.45.)

Schaper contends that the fines were in excess of the amount permitted by either applicable statute, and the People concede that Schaper is correct. We agree with the parties. Pursuant to section 1202.4 subdivision (b)(1), the restitution fine "shall be set at the discretion of the court" and, in the case of a felony "the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000)." Further, the parole revocation restitution fine also may not exceed $10,000 because it must be in the same amount as the restitution fine imposed pursuant to section 1202.4 subdivision (b). (§ 1202.45, subd. (a).) " '[T]he maximum [restitution] fine that may be imposed in a criminal prosecution is $10,000 'regardless of the number of victims or counts involved." ' " (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534 (*Blackburn*).)

Although the parties agree that the amount imposed was in excess of the statutorily authorized amount, they disagree on the proper remedy. Schaper contends that we should remand to the trial court to exercise its discretion to set fines within the permissible range. The People contend that we should modify the judgment to reduce both fines to $10,000 each. Although we are authorized under proper circumstances to enter a modified judgment when a sentence is unauthorized without remanding to the trial court (see *Blackburn, supra,* 72 Cal.App.4th at p. 1534), in this instance, we decline to do so. The relevant statute states that "[t]he restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1).) In this case, it is unclear from the record why the trial court chose the amount of $17,600 for the fines, and it is unclear whether it understood the range of its discretion to impose a fine between $300 and $10,000. Accordingly, we will remand to allow the trial court to exercise its discretion regarding the fines in the first instance.

C. *Schaper Is Entitled to an Additional Day of Presentence Custody Credit*

The abstract of judgment identifies 414 days of actual presentence custody credits. This calculation was apparently based on the probation officer's report, which recommends that the trial court grant 414 days of actual credit based on an arrest date of October 27, 2016. The abstract of judgment also identifies 62 days of local conduct credit (§ 2933.1), for a total of 476 days of credit for time served.

However, as Schaper points out, other documents in the record establish that Schaper's arrest date was actually one day earlier on October 26, 2016. Accordingly,

Schaper argues that he should have been granted 415 days of actual presentence custody credit instead of 414 days. The People agree.

We therefore direct the trial court to amend the abstract of judgment to identify 415 days of actual presentence custody credits instead of 414 days. Together with the local conduct credits of 62 days, as indicated in the abstract of judgment, the total credit for time served in the amended abstract of judgment should be 477 days.

DISPOSITION

The restitution fine (§ 1202.4, subd. (b)) and the parole revocation restitution fine (§ 1202.45) in the amount of $17,600 each is reversed. This matter is remanded to the trial court for the limited purpose of exercising its discretion to impose a restitution fine and a parole revocation restitution fine in an amount between $300 and $10,000 each, and to prepare a corresponding amended abstract of judgment. The trial court shall also amend the abstract of judgment to reflect 415 days of actual presentence credit, for a total of 477 days of credit for time served. The trial court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

GUERRERO, J.